



The Indiana Prosecutor

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In this issue...

Recent Decisions

<i>Field v. State</i>	1
<i>Trujillo v. State</i>	2
Curfew Law Disputed Again	2
Another Prosecutor Called to Active Duty	3
Commissioner Declares Diversion Program	
Unconstitutional	3
Don't Miss IPAC Summer Conference July 7-9	3
Execution Date Set for Darnell Williams	4
Thirty-two Attend IPAC Trial Advocacy Course	5
Summer Begins & Ends With Strict Seatbelt Enforcement	5
Hoosiers Favor Loophole in Seatbelt Law	5
Traffic Safety Resource Prosecutor Digest	6
Former Chief Deputy Named Judge	7
Stranger Than Fiction	7
Just For Laughs	8
Positions Available	8
Calendar of Events	9



RECENT DECISIONS

TOBACCO RESIDUE IN MOUTH DID NOT INVALIDATE BREATH TEST RESULT

Field v. State

 N.E.2d

(Ind. Ct. App. 4/28/04)

For the third time this year the Indiana Court of Appeals was asked to determine the validity of breath test results obtained on a certified breath test instrument when the test subject had

“something” in his or her mouth.

In February, 2004, one panel of the Court of Appeals concluded that the defendant had not “put” any foreign substance into his mouth during the required twenty minute waiting period prior to the administration of a certified breath test. *State v. Molnar*, 803 N.E.2d 261. At issue in *Molnar* was the effect of tobacco residue that possibly remained in Molnar’s mouth after the chewing tobacco previously in his mouth had been removed. The Court concluded that “put” meant “put.” In that the defendant had not “put” anything into his mouth during the 20 minute wait, the officer had followed the regulations for administration of a certified breath test, the Court concluded. The Court held that the defendant’s breath test was not invalidated as a result of tobacco residue remaining in Molnar’s mouth.

On April 2, 2004, another panel of the Court of Appeals was asked to address the validity of a breath test run while the defendant, Breanna Guy, had a tongue stud in her mouth. This panel concluded that “put” - in the rule that requires that no foreign substance be placed in the mouth for 20 minutes prior to a breath test - means “present”. The Court in *Guy*, concluded that a tongue stud was a “foreign substance” and that its presence during the twenty minute waiting period invalidated the defendant’s breath test results.

A third panel of the Court of Appeals was asked in *Field* to determine the validity of yet another case in which the defendant may have had tobacco residue in his mouth at the time he was run on a certified breath test instrument. At least 20 minutes prior to the test Fields had removed chewing tobacco from his mouth as requested. In *Field* the Court concluded that the requirement of 260 IAC 1.1-4-8(1) that a person must not have had any foreign substance in his/her mouth for 20

minutes prior to testing was satisfied when the officer had the defendant remove a plug of chewing tobacco from his mouth and then waited 20 minutes to conduct a breath test. The Court of Appeals concluded that the defendant failed to show that if tobacco residue did remain in his mouth, the amount of residue that remained influenced the breath test result.

The Attorney General has sought transfer in the *Guy* case. It is hoped, in light of the contrary holdings of the Court of Appeals; that the Supreme Court will accept transfer and address the issue presented in each of these cases.

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**PROTECTED PERSON STATUTE
REVIEWED**

Trujillo v. State

____N.E.2d ____

(Ind. Ct. App. 4/15/04)

A child-victim's statements to her mother and to law enforcement were admissible under the Protected Person Statute, I.C. 35-37-4-6, the Court of Appeals concluded in this April 5 decision.

The Court's conclusion was based upon its finding that the child had told her mother of her molestation at the first available opportunity; that her statements were spontaneous; and that she subsequently repeated her version of events to her father when he did not believe her initially.

The statements of the child to a law enforcement officer were also found to fall within the purview of the Protected Person Statute. In concluding that the child's statements to law enforcement were reliable, the Court considered that the statement was made outside the presence of the child's parents and that the mother testified that she had not talked to the child about the incident after the child had been examined at the hospital. Further, the Court considered the child's use of age-appropriate language and the spontaneous nature of her response to the detective's inquiry when he asked her whether she knew why she had been brought to talk to him. Finally, the Court found important the fact that the child had not been asked

leading questions by the officer.

Two earlier appellate cases reviewed the Protected Person statute. Those cases were *Pierce v. State*, 677 N.E.2d at 44, and *Carpenter v. State*, 786 N.E.2d at 698.

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